

## **MASSACHUSETTS APPEALS COURT**

### **NOTICE FOR PUBLIC COMMENT**

#### **Proposed Amendments to Appeals Court Standing Order Concerning Petitions to the Single Justice Pursuant to G.L. c. 231, § 118 (First Paragraph)**

The Appeals Court invites public comments on its proposed amendments to the Standing Order Concerning Petitions to the Single Justice Pursuant to G.L. c. 231, § 118 (First Paragraph). The court proposes the standing order be amended so that it will govern the format and filing of a petition for review of an impoundment order entered pursuant to Rule 12(a) of the recently amended Trial Court Rule VIII, Uniform Rules on Impoundment Procedure (U.R.I.P.), which become effective on October 1, 2015. The amendments include revising the title and first sentence of paragraph (a) to add "or Rule 12(a) of the Uniform Rules on Impoundment Procedure" and by deleting the term "interlocutory" in paragraphs (a) and (b). In addition, the court proposes that paragraph (f), Electronic Copy, be amended to require a duplicate of the supporting appendix be filed in PDF, instead of permitting it if feasible.

Attached is a copy of the proposed amended standing order and the text of amended Rule 12 of the Uniform Rules of Impoundment Procedure.

The Appeals Court welcomes all comments on the proposed amendments. Comments should be directed to Joseph Stanton, Clerk, Massachusetts Appeals Court, One Pemberton Square, Boston, MA 02108, or to [joseph.stanton@appct.state.ma.us](mailto:joseph.stanton@appct.state.ma.us), on or before June 26, 2015. The comments received will be made available to the public.

## PROPOSED AMENDMENTS

### **Standing Order Concerning Petitions to the Single Justice Pursuant to G.L. c. 231, § 118 (First Paragraph) or Rule 12(a) of the Uniform Rules on Impoundment Procedure**

(a) Contents of Petition for ~~interlocutory~~ Relief; Form. A petition for ~~interlocutory~~-relief pursuant to G. L. c. 231, § 118 (first paragraph), or Rule 12(a) of the Uniform Rules on Impoundment Procedure, shall include, in the following order: (1) a request for ~~interlocutory~~ review, which shall state briefly the nature of the order or action of the trial court from which review is sought, the entry date of such order or action, and the name of the judge who entered it; (2) a statement of the issues of law raised by the petition; (3) a statement as to whether a party has filed, served, or intends to file a motion for reconsideration in the trial court; (4) a statement of the specific relief requested; and (5) an addendum containing a copy of the order or action of the trial court (a draft order for the single justice may be attached). References to the parties in the petition shall be by designation of the party in the trial court (e.g., "plaintiff," "defendant," "third-party defendant," etc.). The petition shall not exceed five pages of text compliant with Mass.R.A.P. 20[a][1]-[3] without leave of the court.

(b) Supporting Memorandum of Law and Record Appendix. The petition shall, unless otherwise ordered, be accompanied by a memorandum of law (not to exceed fifteen pages of text compliant with Mass.R.A.P. 20[a][1]-[3] unless leave of the court has been obtained) in support of the petitioner's position, with citations to appropriate authorities and a statement addressing why ~~interlocutory~~ relief is appropriate. The argument shall make reference to those portions of the record which are directly relevant to the issues raised by the petition. Relevant portions of the record shall be filed as a record appendix, and include a current copy of the trial court docket entries and all relevant papers filed in the trial court, including those filed by the other party or parties. The record appendix shall commence with a table of contents that lists each document contained therein. Only those pleadings, exhibits, and papers which were before the trial court when the order appealed from was entered, and which are necessary for an adjudication of the issues raised, may be submitted.

(c) Opposition; Form. Within seven days (ten days if the petitioner's certificate of service required under [d] hereof shows service by first-class mail) after the filing of the petition, or such other time as the court may direct, the other party or parties to the case may, but need not, file and serve an opposition thereto (not to exceed fifteen pages of text compliant with Mass.R.A.P. 20[a][1]-[3] unless leave of court has been obtained) setting forth reasons why the petition should not be granted. The opposition shall not restate matters contained in the petition unless the opposing party is dissatisfied with the statement thereof contained in the petition. The opposition may be accompanied by a supplemental record appendix containing such additional portions of the record as were before the trial court and are necessary for adjudication, and which the petitioner failed to include in its record appendix.

(d) Filing; Service. The petition, memorandum, record appendix, and any subsequently filed opposition and supplemental record appendix, shall be filed in the office of the Clerk of the Appeals Court with a certificate of service on all other parties in the case, including the service and filing of a copy in the appropriate trial court clerk's office from which the matter arose. No additional paper copies of the petition or opposition are required to be filed in the Appeals Court. The certificate of service shall set forth the name, address, and telephone number of counsel or other persons upon whom service has been made, and specify the date and manner of service. The certificate of service shall identify the name of each party represented by counsel and specify the counsel who represents each party.

Service may be personal or by first class mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by first class mail is complete on mailing.

(e) Impounded or confidential information. In any case in which the trial court entered an order impounding, sealing, or excluding from public access all or any portion of the trial court records, or there is material or information in a party's petition, addendum, opposition, or any appendix that is automatically impounded or deemed confidential by statute or court rule, the parties shall comply with Mass.R.A.P. 16(d), 16(m), and 18(g). If the trial court record includes any items listed as "personal identifying data" in the Supreme Judicial Court's Interim Guidelines on Personal Identifying Data, the parties shall comply with the guidelines in all filings to the Appeals Court.

(f) Electronic Copy. When a party represented by counsel files a petition or opposition thereto, including any supporting memorandum of law, the filer shall, in addition to the paper copy, simultaneously provide the court with a searchable PDF (portable document format) copy of the petition or opposition, and supporting memoranda of law, and record appendix either (i) on a CD-ROM, or (ii) by an email, to which the PDF copies are y-is attached, sent to: emotions@appct.state.ma.us. A PDF copy of the record appendix may be filed if feasible to produce. The court's email will not accept a PDF that exceeds 10 megabytes; any such PDF shall be submitted on a CD.

The ~~CD-ROM and~~ electronic copy and email filing requirements are waived for self-represented litigants.

(g) Hearing. The single justice has discretion to determine whether a hearing shall be held.

**Excerpts from the 2015 Amended Uniform Rules on Impoundment Procedure and committee's handbook (effective Oct. 1, 2015)**

**Rule 12. Appellate Review**

**(a). Review of Orders Entered in Ongoing Proceedings.** A party or interested nonparty aggrieved by an order impounding or refusing to impound material, or vacating, modifying, or refusing to modify a prior order of impoundment in an ongoing proceeding, may enter in the Appeals Court, within thirty days of the entry of such order, a petition for review by the single justice. The single justice's review shall proceed in accordance with the law and procedures governing petitions to the single justice.

**(b). Review of Orders Entered in Proceedings Which Have Concluded.** Upon the entry of judgment, including in an action commenced pursuant to URIP Rule 6(b), or other final disposition of the proceeding, any appeal of an impoundment order proceeds pursuant to the Massachusetts Rules of Appellate Procedure.

**(c). Notice to the Clerk.** In any matter entered or pending in an appellate court, the filer of any document shall provide written notice to the clerk of the appellate court of any document that contains impounded information. Such notification shall accompany the document and specify those papers, documents, or exhibits, or portions thereof, that are impounded and shall include a copy of the order of impoundment, if any, or a reference to other authority for the impoundment. Unless otherwise ordered, material impounded in the Trial Court shall remain impounded in the appellate court.

**Committee Notes**

Under URIP Rule 12(a), a party or interested nonparty aggrieved by a Trial Court order entered under the URIP in an ongoing civil or criminal case may seek review of the order by filing, within thirty days of the order's entry date, a petition in the Appeals Court for review by the single justice. See In re Globe Newspaper Co., Inc., 461 Mass. 113, 124-125 (2011); Commonwealth v. Silva, 448 Mass 701, 705 (2007); Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 601 (2000).

Under URIP Rule 12(b), a party or interested nonparty aggrieved by a Trial Court order entered under the URIP in a case in which judgment has entered, including a judgment in a proceeding pursuant to URIP Rule 6(b), or where the proceedings have otherwise finally concluded, shall pursue any appeal from the impoundment order in accordance with the Massachusetts Rules of Appellate Procedure. See Ottaway Newspapers, Inc. v. Appeals Court, 372 Mass. 539, 551

(1977) (a separate civil action brought against the court issuing the impoundment order will “end in a judgment capable of appeal under ordinary rules”). Such an appeal is commenced by filing a notice of appeal in the Trial Court within thirty days of the judgment. See generally Mass.R.A.P. 3 and 4. The notice of appeal shall specify that it is, or that it includes, an appeal from the impoundment order. The appeal will be determined by a full panel of the appropriate court.

### **Procedure for Single Justice Review**

A petition for review filed pursuant to URIP Rule 12(a) shall proceed to a single justice of the Appeals Court. See In re Globe Newspaper Co., Inc., 461 Mass. 113, 124-125 (2011); Commonwealth v. Silva, 448 Mass 701, 705 (2007); Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 601 (2000). The single justice determines whether the Trial Court judge abused his or her discretion or committed an error of law. See Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 601 (2000). The single justice may deny the petition, modify or vacate the order, or report the matter to a panel of the Appeals Court.

The Appeals Court's procedures for a petition to the single justice for review under URIP Rule 12(a) mirror the procedures for review of certain civil interlocutory orders under G. L. c. 231, § 118 (first par.). To seek review under URIP Rule 12(a), the aggrieved party or interested nonparty is required, within thirty days of the entry of the order, to enter in the Appeals Court a petition for review, a supporting memorandum of law, a certificate of service, and copies of the relevant documents filed in the Trial Court. Cf. Appeals Court Standing Order Governing Petitions to the Single Justice Pursuant to G. L. c. 231, sec. 118 (first paragraph). Importantly, single justice review under URIP Rule 12(a) is commenced when a petition is filed in the Appeals Court; a notice of appeal filed in the Trial Court is ineffective and does not perfect review by the single justice.

A Trial Court order impounding, vacating, modifying, or refusing to impound material remains in effect until and unless otherwise ordered by the single justice or an appellate court. There is no automatic stay of an order releasing previously impounded information. When an order permits or requires the release of previously impounded information, it is prudent for the aggrieved person to request that the Trial Court stay the order to permit the filing of a petition for single justice review or a stay pending appeal to a panel. An aggrieved person may also request a stay from the single justice when the petition is filed, but the motion shall show that application to the lower court for the relief sought is not practicable, or that the lower court has previously denied an application for a stay or has failed to afford the relief which the applicant requested with the reasons given by the lower court for its action. Cf. Mass.R.A.P. 6(a)(1) and 6(b)(1). Any hearing on the petition is scheduled at the discretion of the single justice.

A person aggrieved by an order of the single justice of the Appeals Court reviewing a Trial Court judge's impoundment order has no right of appeal to a panel. If the single justice does not report the petition to a panel for review, the only recourse for the litigant is to file a petition in the

Supreme Judicial Court for Suffolk County seeking to invoke the court's general superintendence power under G. L. c. 211, § 3. See Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 601-602 (2000). A person aggrieved by an order of a single justice of the Supreme Judicial Court pursuant to G. L. c. 211, § 3 may appeal to the full Supreme Judicial Court; but where the single justice has denied relief from an interlocutory order concerning impoundment in the trial court, the appeal will be subject to the requirements of S.J.C. Rule 2:21. Boston Herald, Inc. v. Sharpe, 432 Mass. 593, 602 n.19 (2000).

### **Procedure for Appeals Governed by the Massachusetts Rules of Appellate Procedure**

After the entry of a final judgment, including in an action commenced under URIP Rule 6(b), or other final disposition, the appeal proceeds in accordance with the Massachusetts Rules of Appellate Procedure and is commenced by the filing of a timely a notice of appeal pursuant to Mass.R.A.P. 3(a) and 4(a) or 4(b). In all cases in which material has been impounded in the Trial Court, the clerk of the Trial Court shall notify the clerk of the appellate court at the time of the assembly and transmission of the record that the record contains impounded information. See S.J.C. Rule 1:15, § 2(a); Mass.R.A.P. 9(d). Such notification shall specify those papers, documents, or exhibits, or portions thereof, that were impounded below and shall include a copy of the order of impoundment, if any, or a reference to other authority for the impoundment. S.J.C. Rule 1:15, § 2(a). Pursuant to S.J.C. Rule 1:15, § 2(b), unless otherwise ordered, material impounded in the Trial Court shall remain impounded in the appellate court, and no new motion to impound in the appellate court is required. After the case is docketed in an appellate court, a party should confirm that the appellate docket properly reflects that the matter or materials remain impounded.

Upon entry of the appeal in the Supreme Judicial Court or the Appeals Court, original requests for impoundment are governed by S.J.C. Rule 1:15, which, in turn, require that the appellate courts follow the Uniform Rules on Impoundment Procedure in both civil and criminal appeals. The scheduling of any hearing on a request for impoundment is set by the appellate court.

If Trial Court record material that was not impounded at the Trial Court level is sought to be impounded in an appellate court, a motion for impoundment should be addressed in the first instance to the Trial Court since, presumably, the same record material remains public in the Trial Court. As noted, once materials are impounded by the Trial Court, they retain their impounded status in the appellate court. As to materials sought to be impounded that were not part of the Trial Court record and are being filed for the first time in an appellate court, a motion for impoundment should be filed in the appellate court where the appeal is pending. In all instances, the filer of any impounded documents in an appellate court is required to notify the appellate clerk that impounded information is being filed. See S.J.C. Rule 1:15, § 2(c). The filer is required to prepare filings containing impounded information or material in a specific manner. See Mass.R.A.P. 16(d), 16(m), 18(a), and 18(g).

When a single justice of the Appeals Court rules on an impoundment matter in the first instance (i.e., when not reviewing a trial court's order of impoundment under URIP Rule 12), the order is reviewable by a panel of the Appeals Court. See Jaynes v. Commonwealth, 436 Mass. 1010, 1011 (2002); Kordis v. Appeals Court, 434 Mass. 662, 669 (2001); Commonwealth v. O'Brien, 27 Mass. App. Ct. 184, 190 (1989). Review of an order entered in the first instance by a single justice of the Supreme Judicial Court may be appealed to the full Court. After the appeal is entered in an appellate court, the appellate court may vacate or modify a prior order of impoundment. Adams v. Adams, 459 Mass. 361, 361 n.1 (2011). On its own initiative, the appellate court may terminate an impoundment order of the lower court, even where the impoundment was not at issue on appeal. See id. at 361 n.1 (vacating impoundment order where lower court's order did not address the order's continued efficacy); Vranos v. Franklin Medical Center, 448 Mass. 425, 425 n.1 (2007) (vacating impoundment order after finding the order was designed for limited purposes and no continuing need for impoundment existed).

In Skyhook Wireless, Inc. v. Google, Inc., 86 Mass. App. Ct. 611, 612 n.4 (2014), the Appeals Court considered materials and facts governed by impoundment orders issued by the Superior Court, which originated pursuant to a "stipulated protective order for litigation involving patents, highly sensitive confidential information and/or trade secrets." Where some of the facts recited in the Appeals Court's forthcoming opinion would be drawn from a volume of the joint record appendix labeled by the parties as including impounded material, before publication of the opinion the court solicited letters from the parties as to whether and why they contended any of those specific facts should be subject to continuing impoundment. Id. The responses of the parties, and an interested nonparty, disavowed any need for impoundment of the identified facts. Id. The Appeals Court vacated the Superior Court impoundment orders to the limited extent necessary to allow public dissemination of those facts in the Appeals Court's opinion. Id.

**Duty of Filer to Provide Written Notice to the Clerk of Impounded Information.** Rule 12(c) is consistent with Supreme Judicial Court Rule 1:15, § 2,(c) and Rule 13 of the Uniform Rules on Impoundment Procedure (2015).

Appellate documents are commonly made available to the public over the internet by the appellate court, commercial entities, and law libraries. To protect the confidentiality of impounded information, the filer of any document in the appellate court must provide written notice to the court of each filing that contains impounded material. The clerk will designate these materials as impounded and not available for public inspection. In addition, the filer is required to prepare filings containing impounded information or material in a specific manner. See Mass.R.A.P. 16(d), 16(m), 18(a), and 18(g).